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No. 93-668

In The

Supreme Court of the United States

October Term, 1993

HANOVER SOCIETY FOR THE DEAF, INC.,

Petitioner,

v.

BOARD OF SUPERVISORS OF HANOVER COUNTY,

Respondent.

On Petition For Writ Of Certiorari
To The Virginia Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BOARD OF SUPERVISORS OF
HANOVER COUNTY

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QUESTIONS PRESENTED

None of the questions presented by the Hanover Society for the Deaf ("Society") for review by the Court on writ of certiorari are appropriate under the criteria set forth in Rule 10 of the Supreme Court Rules.

The first question stated in the Society's Petition is simply not presented by the facts in this case, because the Society did use "compulsory process" to subpoena witnesses for the trial court appeal from the administrative decision to deny its bingo permit application, and those witnesses were present and available to testify. The trial court, however, decided that Virginia law intended such appeals to be held "on the record" and declined to hear the testimony of the subpoenaed witnesses.

The second question stated by the Society in its Petition regarding the applicability of the due process clauses in the Fifth Amendment is inappropriate for review because, under the laws of the Commonwealth of Virginia, local governing bodies enjoy significant discretion in determining whether a bingo permit should be issued. Accordingly, a bingo permit applicant has no legitimate entitlement and, hence, no cognizable property interest which would invoke due process considerations.

The third question stated by the Society need not be reviewed by this Court, because it is clear that the decision of an Ohio court interpreting an Ohio statute does not create a binding precedent for a Virginia court interpreting a Virginia statute.

QUESTIONS PRESENTED – Continued

The fourth question stated by the Society, concerning whether a portion of Virginia's statutes pertaining to bingo permits is "unconstitutionally vague", is not appropriate for review because the Society's brief fails to identify any aspect of the statute that is "unconstitutionally vague" and reflects merely the Society's displeasure with the finding of the trial court that the Society has failed to meet the requirements for organizations permitted to conduct bingo games under Virginia law.

The fifth question stated by the Society appears to be no more than a repetition of the second question stated by the Society.

The sixth question stated by the Society is not appropriate for review by this Court because it misrepresents the provisions of the Virginia statutes governing the issuance of bingo permits which clearly establish criteria governing the issuance of such permits and provide for an administrative hearing with an appeal by right to the Circuit Court.

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STATEMENT OF THE CASE

Hanover Society for the Deaf, Inc. (the "Society") is petitioning this Court for a writ of certiorari for review of a decision of the Virginia Supreme Court. By order entered June 3, 1993, the Virginia Supreme Court refused the petition for appeal of the Petitioner from the Hanover County Circuit Court and by order entered July 30, 1993 denied a Petition for Rehearing. The order of the Hanover County Circuit Court (the "Circuit Court") affirming the decision of the Hanover County Administrator denying the bingo permit application of the Society was entered March 12, 1993.

STATEMENT OF FACTS

Hanover County finds that the statement of facts offered by the Society in its Petition for Writ of Certiorari intermixes facts with conclusions of law, argument and prayer for relief. At issue is the bingo permit application of the Society for 1993 which was filed with Hanover County, Virginia (the "County") on or about December 12, 1992. The Society's 1992 permit was extended until January 31, 1993, in order to provide an adequate opportunity for the County to review the application. On January 29, the County Administrator sent a letter to Mr. Norman Eddleton, President of the Society, specifying in considerable detail the County Administrator's reasons for denying the Society's bingo permit application for 1993.

At the request of Mr. Robert S. Ganey, counsel for the Society, the County Administrator extended the Society's 1992 bingo permit until February 9, 1993, in order that the Society might exercise its right to an administrative hearing. The hearing was held in the County Administrator's office on February 8, 1993, for a period of approximately two hours. The Society was represented by Mr. Ganey, its counsel, Mr. Robert Eddleton, Secretary and Treasurer of the Society, and Mr. Frank Stahl, a Certified Public Accountant who filed the most recent annual audit report for the Society.

On February 9, 1993, the County Administrator sent a letter to Mr. Eddleton stating his conclusions after the hearing held on February 8 and denying the Society's bingo permit application.

The Society's appeal from the County Administrator's decision was filed with the Circuit Court pursuant to Va. Code Ann. § 18.2-340.12 (Supp. 1992) on or about February 10, and on February 12, after argument by counsel, the Circuit Court ordered that the Society could continue to conduct bingo games pending a hearing on the merits of the Society's appeal. The Circuit Court further indicated that it intended to hear this appeal on the administrative record and would receive additional evidence only if it were clearly required to meet the ends of justice.

In accordance with the Circuit Court's direction and the agreement of counsel, a transcript of the hearing before the County Administrator on February 8 was prepared, and the County compiled all of the documents in its administrative files that it deemed relevant to these proceedings. On March 1, the Society submitted its memorandum in support of its appeal and an "addendum" consisting of documents from the County's files pertaining to other bingo permit applications, signatures on a petition in support of the Society's bingo games, copies of bank loan applications made after the February 8 County Administrator's hearing, portions of a rental rate study for facilities located in an adjoining county and other documents with no apparent relevance to the pending proceeding. The Trial Memorandum of the County was filed on March 5, and the hearing was held in the Circuit Court on March 10, 1993. The Society had subpoenaed a number of witnesses, ostensibly to testify with regard to other bingo permit applications, and these witnesses were present and available to testify.

In preliminary proceedings on March 10, the Circuit Court ruled that it had reviewed and would consider all of the documents and other materials previously submitted by the parties, but that it would not receive additional evidence or hear the testimony of witnesses, to which ruling counsel for the Society objected. After a hearing on the record, the Circuit Court sustained the decision of the County Administrator to deny the bingo permit application of the Society and, on March 12, 1993, entered an order to that effect.

The Society was established by members of the family of Beauford D. and Evelyn Eddleton in 1978 and immediately began operating bingo games in the building known as the Jamaica Club situated on property owned by Mr. and Mrs. Eddleton. After the County denied the Society's bingo permit application in December of 1980 because of the excessive rents paid by the Society to Mr. and Mrs. Eddleton, in violation of State law, the Society was incorporated in March of 1981 and apparently purchased the Jamaica Club property in September of 1981, although the deed was not recorded until February 4, 1993.

The initial Board of Directors of the incorporated Society consisted of Norman D. Eddleton, President, Janet Henderson, Vice President, and Robert D. Eddleton, Secretary and Treasurer, all three of whom are the children of Beauford D. and Evelyn Eddleton. The same persons still hold these offices today.

In 1981, the three members of the Board of Directors, the children of Mr. and Mrs. Eddleton, decided that the Society would purchase the Jamaica Club property from

their mother and father and agreed to the purchase price and other terms of the transaction. This transaction took place while litigation was pending in the Circuit Court regarding the issue of whether the rental payments made by the Society to Mr. and Mrs. Eddleton for the property were "excessive." The rent paid by the Society to Mr. and Mrs. Eddleton during the fiscal year ending September 20, 1980 was $54,434. The terms of the purchase agreement called for the Society to make mortgage payments, in addition to the $40,000 cash payment in September of 1981, amounting to $53,539 per year for the next thirty years, substantially the same as the amount of the rent payments.

The County Administrator's letters of January 29 and February 9 denying the permit recited the fact that the Society failed to file an adequate audit opinion as required by law. Virginia Code Section 18.2-340.6(B)(3) requires that any organization having annual gross receipts from bingo games in excess of $500,000 attach to its financial report an opinion of a licensed independent Certified Public Accountant that:

> (i) the annual financial report represents fairly, in all material respects, beginning cash, receipts, operating costs, use of proceeds, and ending cash;
>
> (ii) the proceeds of any bingo games or raffles have been used, in all material respects, for those lawful, religious, charitable, community, or educational purposes for which the organization is specifically chartered or organized;

(iii) the gross receipts have been used in all material respects, in accordance with the provisions of this article.

There were a number of deficiencies in the audit that resulted in an unacceptable certification of the first standard prescribed by statute. Moreover, the audit opinion failed altogether to address the second and third standards of accounting review specified in the statute. The statute prescribes that the failure to file the opinion of a licensed Certified Public Accountant as required "shall cause the automatic revocation of the permit. . . . "

Furthermore, the County's review of the Society's application and the audit report revealed that in FY 91-92 less than one-half of one percent of the $800,000 in gross proceeds from the Society's bingo operations were spent for charitable purposes, with most of the net proceeds being paid to members of the Eddleton family for "mortgage payments" and for various services.

For these and other reasons cited in the County Administrator's letters of January 29 and February 9, the County Administrator determined that the Society was not an organization "operated exclusively for religious, charitable, community, or educational purposes . . . " as required by Virginia Code Section 18.2-340.1(1)(B). Accordingly, the permit application for 1993 was denied.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE HANOVER COUNTY ADMINISTRATOR TO DENY THE BINGO PERMIT APPLICATION OF THE HANOVER SOCIETY FOR THE DEAF AND THE DECISIONS OF THE VIRGINIA COURTS WERE BASED ON PROVISIONS OF STATE STATUTES. PETITIONER'S ARGUMENTS RAISE ONLY QUESTIONS OF INTERPRETATION OF STATE LAW.

Chapter 8 of Title 18.2 of the Code of Virginia sets forth in detail the statutory scheme for the regulation of bingo and raffles in Virginia. Under these statutes, bingo and raffles constitute a form of gambling and are legal in Virginia only as specifically authorized by statute.

A bingo permit issued by a local governing authority constitutes the granting of a privilege, not a right, and the privilege must be exercised strictly within this specific exception to the general prohibition against gambling. The privilege represented by a permit to operate bingo games is available only to qualified "organizations" as that term is defined in Virginia Code Section 18.2-340.1(1). In addition to voluntary fire departments, rescue squads, veteran's associations and fraternal associations, qualified organizations include any "organization operated *exclusively* for religious, charitable, community or educational purposes. . . . " (Emphasis added.)

Virginia Code Section 18.2-340.3 establishes a number of requirements for the issuance of a permit and limitations upon the validity and duration of the permit. Subsection 5 states that "[u]pon compliance by the applicant with the provisions of this article, and at the *discretion* of

the governing body or its designated official, a permit *may* be issued." (Emphasis added.) This discretionary authority vested in the locality is also evident in Virginia Code Section 18.2-340.10 which provides that the "governing body . . . or local official . . . *may* deny, suspend or revoke the permit of any organization found not to be in *strict* compliance with the provisions of this article." (Emphasis added.) Similarly, Virginia Code Section 18.2-340.12 provides that "[a]fter a hearing on the issues, the local governing body or official . . . *may* refuse to issue or *may* suspend or revoke any such permit . . . . " (Emphasis added.) The emphasis in these statutes upon "strict compliance" with the provisions of the article is further illustrated by Virginia Code Section 18.2-340.6(B) which mandates the *automatic revocation* of a bingo permit for failure to file financial reports when due and also mandates *automatic revocation* if any organization required to do so fails to file the opinion of a licensed independent certified public accountant meeting the specific requirements of paragraph (B)(3).

The County Administrator's decision to deny the Society's permit application and the decisions of the Virginia courts in this case were not arbitrary, capricious or unreasonable. The County Administrator had cogent reasons for denying the permit as articulated in his letters of January 29 and February 9. The bases for the County Administrator's decision were reviewed by the Circuit Court on the record and through the memoranda and oral argument of counsel and found to be sufficient and compelling. The Society has presented no evidence or argument that the County Administrator's denial of the permit application exceeded the authority of the County

Administrator, involved an error of law, resulted from fraud or corruption, or was otherwise subject to reversal under the standards for judicial review of discretionary administrative actions. Consequently, the County Administrator's decision was properly sustained by the Circuit Court and by the Virginia Supreme Court.

The Society's arguments for review by this Court, although couched in terms of constitutional law, are merely disagreements with the Virginia laws pertaining to bingo and with the fact findings of the County Administrator and Hanover County Circuit Court. The issue raised in the Society's brief regarding the decision of the Hanover County Circuit Court to hear the appeal on the record and not to allow the testimony of witnesses pertains only to the interpretation of the State statutes and raises no federal questions. Decisions of state courts adequately supported by state law are not reviewed by this Court unless there are substantial, or "grave" federal questions raised. *U.S. v. Johnston*, 268 U.S. 220 (1925). Mere invocation by a petitioner of the due process and equal protection clauses of the Constitution does not provide a basis for this Court to interpret state laws. *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157 (1917).

II. THE DECISION AND THE DECISION MAKING PROCESS BY WHICH THE HANOVER COUNTY ADMINISTRATOR DENIED THE BINGO PERMIT APPLICATION OF THE HANOVER SOCIETY FOR THE DEAF WERE CONSISTENT WITH THE EQUAL PROTECTION AND DUE PROCESS RIGHTS OF THE APPLICANT.

The Society's attempts to invoke the concepts of procedural and substantive due process in this case are misguided. In order for the Society to state a claim either under procedural or substantive due process, it must first demonstrate that it has a "cognizable property interest, rooted in State law," in its lost benefit, i.e. its permit to operate bingo games. *See Scott v. Greenville County*, 716 F.2d 1409, 1418 (4th Cir. 1983). However, a property interest requires more than a "unilateral expectation" that a permit or license will be issued; instead there must be a "legitimate claim of entitlement." *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Where a local agency has significant discretion in determining whether a permit should issue, then a claimant has no legitimate entitlement and, therefore, no cognizable property interest. *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63, 68 (4th Cir. 1992).

Moreover, even if due process considerations were applicable, the Virginia bingo statutes, which require an opportunity for an administrative hearing prior to any decision to deny or revoke a permit and allow an appeal by right to circuit court, provide ample procedural due process. The Society has not alleged in this case any failure to comply with the procedural requirements of the

State statute. It is undisputed that the Society was provided with detailed notice and ample opportunity to be heard prior to the County Administrator's final decision to deny its permit application. Furthermore, upon the request of Society, the County Administrator extended its bingo permit to allow the Society to continue operating bingo games until after the administrative hearing and final decision. The Circuit Court, upon the petition of the Society, allowed it to continue operating bingo games until the Circuit Court had heard its appeal. These proceedings more than satisfy the procedure described in Virginia Code Section 18.1-340.12, and the predispositional and post deprivation due process guarantees of the Virginia Constitution and United States Constitution have been satisfied. The Petitioner has had the benefit of both administrative and judicial review, including the elements of notice and opportunity for hearing required to meet due process requirements. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

With respect to the assertion of the Society that its rights to equal protection under the United States Constitution were deprived by the decision of the County Administrator to deny its bingo permit application, the Society makes no assertion that it is a member of any group or classification that would trigger strict or even heightened scrutiny under equal protection analysis. Consequently, the question under equal protection review is whether the County treated the Society in a manner different from other bingo permit applicants and, if so, whether it had a rational basis for doing so.

The Society's Petition for Writ of Certiorari suggests that its permit application was the only one denied by the

County and that, consequently, it was treated differently from others. In fact, as established by the record before the trial court, in June of 1992, the County denied the bingo permit application of Helping American People, Inc., after determining that, based on the County's investigation, the organization was not "operated exclusively for . . . charitable . . . purposes . . . " as required by Virginia Code Section 18.2-340.1(1). As the denial letters of the County Administrator indicate, this consideration was also the primary factor in his decision to deny the Society's application.

Moreover, ample facts were established in the record before the trial court to distinguish the Society from the other organizations in the County for which bingo permit applications were approved, including the fact that most of the net proceeds from the bingo games were expended by the Society in the form of payments to the parents of the members of the Board of Directors of the Society. These facts establish a rational basis for the County Administrator to deny this permit application while approving the others. When a distinction made in a decision of a government entity, under these circumstances, has a rational basis, there is no infringement of the right of equal protection. *Dandridge v. Williams*, 397 U.S. 471 (1970).

CONCLUSION

The Petitioner presents facts and arguments which amount to disagreement with the factual findings of the Virginia courts and disagreement with the rulings of

those courts regarding State statutes. There is no federal question presented, and the Petition of the Society for Writ of Certiorari should be denied.

Respectfully submitted,

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